Nova Law Review

Volume 22, *Issue* 3 1998 *Article* 8

Defining a New Medium of Communication under the First Amendment: The Supreme Court Tackles Speech on the Internet in Reno v. American Civil Liberties Union

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Abstract

The Internet' has revolutionized the exchange of information by providing our society with a "new marketplace of ideas."2 As history has revealed, new methods of communication lead to differences in opinion.

KEYWORDS: lawsuit, argument, union

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I. INTRODUCTION

The Internet[1] has revolutionized the exchange of information by providing our society with a "new marketplace of ideas."[2] As history has revealed, new methods of communication lead to differences in opinion. Consequently, differences in opinion lead to government regulation, which then lead to litigation.[3] The development of the Internet

1. In *Reno v. ACLU*, the United States Supreme Court defined the Internet as "an international network of interconnected computers." Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997) [hereinafter *Reno II*]. Although it is difficult to estimate because of its rapid expansion, the Internet connects approximately 9.4 million computers worldwide and is believed to transmit the speech of 40 million people. Brief for Appellees at *9, *Reno II* (No. 96-511), 1997 WL 74378. For extensive facts on the Internet, its history, and how it works see *Reno II*, 117 S. Ct. at 2334–36.

2. *Id.* at 2351. For the origin of this marketplace concept, see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

3. *See, e.g.*, Denver Area Educ. Telecomms. Consortium v. FCC, 116 S. Ct. 2374, 2381 (1996) (upholding a provision that allowed cable operators to ban indecent programming on

created relatively effortless access to adult-oriented materials for both children and adults. This fact influenced the government to enact a regulation to protect minors.[4] This regulation spurred litigation which has made its way through the legal system, all the way to the United States Supreme Court.[5]

On June 26, 1997, in *Reno v. ACLU* ("*Reno II*")[6] the first United States Supreme Court case involving the Internet, the Court handed down a landmark decision.[7] Two provisions of the Communications Decency Act of 1996 ("CDA"),[8] were declared unconstitutional in a 7–2 opinion authored by Justice Stevens.[9] The CDA prohibited the transmission of "indecent"[10] and "patently offensive"[11] communications to minors via the Internet. Moreover, the Court held that indecent speech on the Internet is protected by the First

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leased channels); Sable Communications, Inc. v. FCC, 492 U.S. 115, 124 (1989) (upholding a statute making it a crime to make an indecent interstate telephone call); FCC v. Pacifica Found., 438 U.S. 726, 738 (1978) (upholding a FCC order on a radio broadcast); Young v. American Mini Theatres, 427 U.S. 50, 72–73 (1976) (upholding a Detroit ordinance on adult films); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (upholding restrictions on the use of sound trucks); Saia v. New York, 334 U.S. 558, 559–60 (1948) (striking down an ordinance banning the use of amplification devices without the police chief's permission).

4. *See* 47 U.S.C.A. § 223 (West Supp. 1997).

5. *See Reno II*, 117 S. Ct. at 2329.

6. *Id.*

7. *Id.* at 2351.

8. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 223(a)–(h) (West Supp. 1997)) [hereinafter "CDA"].

9. *Reno II*, 117 S. Ct. at 2351.

10. 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997) (providing for criminal prosecution of anyone in interstate or foreign communications who "by means of a telecommunications device knowingly . . . (i) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age").

11. *Id.* § 223(d)(1). Section 223(d)(1) prohibits:

> Whoever–
>
> (1) in interstate or foreign communications knowingly–
>
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
>
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
>
> any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . shall be fined under Title 18, or imprisoned not more than two years, or both.

Id.

Amendment.[12] This comment analyzes the strengths and weaknesses of the Court's rationale in *Reno II*, examines the implications of this decision, and explores its ramifications on future Internet legislation. Specifically, this author applauds the reasoning applied by the majority and questions the logic of Justice O'Connor's opinion, in which she concurred in part and dissented in part.[13]

The foundation of the Court's analysis in *Reno II* was its declaration that the Internet is a distinct medium of communication which can be distinguished from broadcast media.[14] This distinction provided the Court with the framework for an analysis of the issue presented. The main issue was whether the Court should uphold "the constitutionality of two statutory provisions enacted to protect minors from 'indecent' and 'patently offensive' communications on the Internet."[15]

The decision in *Reno II* is extremely important for several reasons. First, the Court has provided the Internet with the broadest possible First Amendment protection.[16] This opinion sends a message to the legislature that broad, content-based regulations on the Internet will be struck down.[17] Second, the Court was presented with the opportunity to establish First Amendment guidelines with respect to the Internet.[18] These guidelines create a new application of the traditional legal standards of the First Amendment. Finally, this case is significant because the Internet is creating a new jurisprudence.

In examining the Court's decision, Part II of this case comment reviews the factual and procedural history of the case. Although the facts of this case are brief, the procedural history plays a crucial role in the majority opinion because the Court utilizes many of the factual findings and legal arguments found in the United States district court's decision.[19] Part III explains the arguments of each side and the rationale employed by both the majority opinion and the dissent. Part IV of the comment analyzes the Court's logic by focusing on the strengths and weaknesses of both the majority and the dissenting opinions. In conclusion, Part V explores the implications of the

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12. *Reno II*, 117 S. Ct. at 2344.

13. *Id.* at 2351.

14. *Id.* at 2343.

15. *Id.* at 2334.

16. *Id.*

17. Content based regulations "restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972) (citations omitted).

18. *Reno II*, 117 S. Ct. at 2336.

19. *See* ACLU v. Reno, 929 F. Supp. 824 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997) [hereinafter *Reno I*].

Court's reasoning and the ramifications of the decision on future Internet legislation.

II. FACTUAL AND PROCEDURAL HISTORY

A. *The Origin of the Lawsuit*

On February 8, 1996, President Clinton signed into law, as Title V of the Telecommunications Act of 1996,[20] the CDA.[21] Almost as soon as the President's pen left the paper, twenty plaintiffs[22] brought suit against the Attorney General of the United States, Ms. Janet Reno, and the Justice Department[23] challenging the constitutionality of two provisions[24] of the CDA.[25] As a result, United States District Judge, Judge Buckwalter, entered a temporary restraining order against section 223(a)(1)(B)(ii) as it related to indecent communications.[26]

Accordingly, a second group of twenty-seven plaintiffs[27] filed suit against the appellants also challenging the constitutionality of the statute on

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20. 47 U.S.C.A. § 223(a)–(h) (West Supp. 1997).

21. *Reno II*, 117 S. Ct. at 2329.

22. The plaintiffs in the initial suit included the following: American Civil Liberties Union; Human Rights Watch; Electronic Privacy Information Center; Electronic Frontier Foundation; Journalism Education Association; Computer Professionals for Social Responsibility; National Writers Union; Clarinet Communications Corp.; Institute for Global Communications; Stop Prisoner Rape; AIDS Education Global Information System; Bibilbytes; Queer Resources Directory; Critical Path AIDS Project, Inc.; Wildcat Press, Inc.; Declan McCullagh dba Justice on Campus; Brock Meeks dba Cyberwire Dispatch; John Tyler dba The Safer Sex Page; Jonathan Wallace dba The Ethical Spectacle; and Planned Parenthood Federation of America, Inc. *Id.* at 2339 n.27.

23. Hereinafter, Ms. Reno and the Justice Department will be referred to as the "appellants."

24. These challenged provisions are 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997) and 47 U.S.C.A. § 223(d)(1) (West Supp. 1997).

25. *Reno II*, 117 S. Ct. at 2339.

26. *Id.* Section 223(a)(1)(B) is the "indecency provision."

27. The plaintiffs in the subsequent suit included the following: American Library Association; America Online, Inc.; American Booksellers Association, Inc.; American Society of Newspaper Editors; Apple Computer, Inc.; Association of American Publishers, Inc.; Association of Publishers, Editors and Writers; Citizens Internet Empowerment Coalition; Commercial Internet Exchange Association; Compuserve Inc.; Families Against Internet Censorship; Freedom to Read Foundation, Inc.; Health Sciences Libraries Consortium; Hotwired Ventures, LLC; Interactive Digital Software Association; Magazine Publishers of America; Microsoft Corp.; The Microsoft Network, LLC; National Press Photographers Association; Netcom On-Line Communication Services, Inc.; Newspaper Association of

its face.[28] Both cases were consolidated into a single suit and were brought before a three-judge district court pursuant to the CDA.[29] The district court granted a preliminary injunction against the enforcement of the challenged provisions.[30]

B. *The United States District Court Opinions*

The United States district court judges unanimously held the CDA to be unconstitutional.[31] However, each of the three judges wrote a separate opinion, each using a slightly different rationale to reach their decision.[32] These opinions are important because the reasoning applied in each one was influential in the Supreme Court's decision.

Consequently, Chief Judge Sloviter recognized that "there is certainly a compelling government interest to shield a substantial number of minors from some of the online material that motivated Congress to enact the CDA."[33] However, she questioned the strength of the appellant's interest in this case.[34] Chief Judge Sloviter held that the CDA abridges the First Amendment because it regulates more than is necessary; thus, it "chills the expression of adults."[35] In addition, she was not convinced by the appellant's contention that the application of the CDA could be narrowly tailored only to commercial pornographers.[36] Lastly, Chief Judge Sloviter rejected the affirmative defenses[37] encompassed by the CDA because she felt

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America; Opnet, Inc.; Prodigy Services Company; Society of Professional Journalists; and Wired Ventures, Ltd. *Reno II*, 117 S. Ct. at 2339 n.28.

28. *Id.* at 2339.

29. *Id.*

30. *Id.*

31. *Reno I*, 929 F. Supp. at 883.

32. *Id.* at 824. The following judges each wrote a separate opinion creating the majority opinion: Chief Judge Dolores K. Sloviter, Judge Ronald L. Buckwalter, and Judge Stewart Dalzell. *Id.*

33. *Id.* at 853. The Court in *Reno II* found the same compelling governmental interest as Chief Judge Sloviter. *Reno II*, 117 S. Ct. at 2346.

34. *Reno I*, 929 F. Supp. at 855.

35. *Id.* at 854 (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989)).

36. *Id.* at 855. Chief Judge Sloviter's point is reflected in the majority opinion. *Reno II*, 117 S. Ct. at 2341.

37. The affirmative defenses include: the "verified credit card" defense, which states that a speaker has a defense from criminal liability if he/she restricts access to indecent materials "by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number," and the "good faith" clause, which stated a speaker must

the defenses were neither technologically feasible nor effectively protective "from the unconstitutional reach of the statute."[38]

Aside from Chief Judge Sloviter's opinion, Judge Buckwalter concluded, according to *Sable Communication of California, Inc. v. FCC*,[39] that the statute was unconstitutionally vague and failed the strict scrutiny standard.[40] Judge Buckwalter reached this conclusion by asserting that the CDA lacked "simple fairness" because the words "indecent" and "patently offensive" were not defined within the statute.[41] Judge Buckwalter agreed with Chief Judge Sloviter that these provisions had a chilling effect on speech on the Internet because users would not know whether they were protected from criminal liability.[42] He felt that the "unique characteristics" of the Internet required cautiously drafted legislation.[43]

Similarly, Judge Dalzell concluded that the CDA was unconstitutional and that the "special attributes" of the Internet invalidated any content-based regulation on this medium.[44] Moreover, he distinguished the Internet as a "new medium of mass communication"[45] that required a "medium-specific" analysis.[46] Judge Dalzell rejected the appellants' argument that the CDA accomplished their interest of protecting minors from pornography because, according to the factual findings, the majority of adult-oriented material on the Internet is transmitted from outside the United States.[47] He concluded that the CDA may have shielded children from pornography originating in New York, but not from Amsterdam; thus, it did not accomplish the government's interest.[48]

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employ "in good faith, reasonable, effective, and appropriate actions . . . to restrict or prevent access by minors" 47 U.S.C.A. § 223(e)(5) (A)–(B) (West Supp. 1997).

38. *Reno I*, 929 F. Supp. at 856. Chief Judge Sloviter's logic is adopted by the Court in *Reno II*. *Reno II*, 117 S. Ct. at 2348–49.

39. 492 U.S. 115 (1989).

40. *Reno I*, 929 F. Supp. at 858.

41. *Id.* at 861–62 (quoting 47 U.S.C.A. § 223(a)–(d) (West Supp. 1997)). The Court in *Reno II* agrees with Judge Buckwalter's holding. *Reno II*, 117 S. Ct. at 2344.

42. *Reno I*, 929 F. Supp. at 865.

43. *Id.* The majority opinion utilizes Judge Buckwalter's reasoning in *Reno II*. *Reno II*, 117 S. Ct. at 2344.

44. *Reno I*, 929 F. Supp. at 867. Judge Dalzell does not define the "special attributes" he referred to in his logic. *Id.*

45. *Id.* at 872.

46. *Id.* Judge Dalzell's "medium-specific" approach is adopted in part in the majority of the Court's approach to the issue presented in *Reno II*. *Reno II*, 117 S. Ct. at 2340.

47. *Reno I*, 929 F. Supp. at 882. Approximately half of the communications that are transmitted over the Internet originate overseas. *Id.*

48. *Id.*

III. THE UNITED STATES SUPREME COURT DECISION

A. *The Appellants' Argument*

The appellants argued that both of the challenged provisions of the CDA were constitutional because they advanced the compelling governmental interest of shielding minors from exposure to adult-oriented material through narrowly tailored means.[49] Furthermore, the appellants contended that since adults and children have a First Amendment right to receive and to gain information via the Internet, parents will be afraid to use this beneficial resource if children have access to "indecent" and "patently offensive" materials.[50] Thus, the appellants stated that the CDA not only advances their compelling interest in protecting minors from harmful materials, it also advances their "equally compelling interest in furthering the First Amendment interest of all Americans to use what has become an unparalleled educational resource."[51]

The appellants addressed the constitutionality of both of the challenged provisions by relying on precedence involving indecency restrictions.[52] First, they argued that since minors do not have the ability to make informed decisions on whether to view sexually explicit material on the Internet, the holding in *Ginsberg v. New York*[53] should be applied.[54] In order to protect the impressionable well-being of minors, the Court in *Ginsberg* upheld an indecency statute prohibiting bookstores and movie theaters from allowing minors to view indecent movies or materials.[55] The appellants contended that this principle also applied to the Internet.[56]

Second, the appellants argued that the holding in *FCC v. Pacifica Foundation*,[57] which stated that government may regulate indecent communications on broadcast media so that children are not exposed to them, also applies to the Internet.[58] Third, the appellants asserted that they have an interest in creating zoning programs to curb the effects of adult-

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49. Brief for Appellants at *14, *Reno II* (No. 96-511), 1997 WL 32931.
50. *Id.* at *18–19.
51. *Id.* at *14–15.
52. *Id.* at *19.
53. 390 U.S. 629 (1968).
54. Brief for Appellants at *20, *Reno II* (No. 96-511).
55. 390 U.S. at 645.
56. Brief for Appellants at *19, *Reno II* (No. 96-511).
57. 438 U.S. 726, 738 (1978). In *Pacifica*, the Court upheld the FCC's prohibition of George Carlin's "Filthy Words" monologue broadcast on radio. *Id.*
58. Brief for Appellants at *20–21, *Reno II* (No. 96-511).

oriented material on children.[59] The appellants argued that zoning ordinances, like those in *City of Renton v. Playtime Theatres, Inc.*,[60] should also apply to cyberspace.[61] Similarly, the government urged that regulating cyberspace is "a zoning issue."[62] Thus, the appellants viewed the CDA as a time, place, and manner restriction.[63]

The appellants also made several alternative arguments. First, they argued that the "patently offensive" provision is not vague because the same words are found in the second prong of the *Miller v. California*[64] test for obscenity.[65] Next, the appellants urged that the challenged provisions are constitutional because of the knowledge requirement and the statutory defenses.[66] Additionally, the government contended that no alternatives existed that were as effective as the CDA in advancing their interests.[67] Furthermore, they argued that technology exists for "tagging"[68] and monitoring indecent and patently offensive materials.[69]

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59. *Id.* at *21–22.

60. 475 U.S. 41, 43 (1986). In *Renton*, the Court upheld a zoning ordinance that prohibited adult movie theaters from being located within 1000 feet of a residential zone. *Id.*

61. Brief for Appellants at *21–22, *Reno II* (No. 96-511).

62. Transcript of Oral Argument at *19, *Reno II* (No. 96-511), 1997 WL 136253 (June 26, 1997). Time, place, and manner restrictions regulate when, where, and how speech is communicated. *See* Frisby v. Schultz, 487 U.S. 474, 488 (1989) (upholding an ordinance that prevented anti-abortion activists from picketing the residence of a doctor who performed abortions).

63. The government contended that the CDA censors places in cyberspace such as mail exploders, chat rooms, and newsgroups. Brief for Appellants at *37, *Reno II* (No. 96-511).

64. 413 U.S. 15, 24 (1973). In *Miller*, the Court created the *Miller* test, which provided the framework to determine obscenity states:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (emphasis added) (citations omitted).

65. Brief for Appellants at *42, *Reno II* (No. 96-511).

66. *Id* at *25–27. The "verified credit card" defense and the "good faith" clause were applied in the event that prosecution occurred. 47 U.S.C § 223(e)(5)(A)–(B) (Supp. 1997).

67. Brief for Appellants at *38, *Reno II* (No. 96-511).

68. *Id.* "Tagging" refers to a system in which the speakers would label or "tag" their speech as "indecent" so that other users would know the type of speech they are encountering. *Id.*

69. *Id.*

Lastly, according to the appellants, if the Court were to deem the provisions unconstitutional, then it should utilize the statutory "severability clause"[70] to eliminate only the unconstitutional terms and not the entire provision.[71] The appellants stated that "[t]he district court threw up its hands and struck down a statute without . . . finding that any more narrowly tailored, constitutionally acceptable solution exists."[72]

B. *The Appellees' Argument*

The appellees based their argument on the contention that the CDA, a content-based regulation, failed strict scrutiny on its face because it was not narrowly tailored to accomplish a substantial government interest.[73] The appellees offered several alternative arguments to prove this contention.[74]

First, the appellees argued that the CDA was unconstitutional because it imposed criminal sanctions on the constitutionally protected speech of adults.[75] The appellees urged that even though the government interest was to protect children, the CDA abridged the First Amendment by banning the indecent speech of adults throughout cyberspace.[76] Therefore, according to the appellees, the CDA was too restrictive because it regulated more than was necessary to achieve the government's interest.[77]

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70. 47 U.S.C.A. § 608 (West Supp. 1997). The "severability clause" states: "If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby." *Id.*

71. Brief for Appellants at *45–47, *Reno II* (No. 96-511).

72. Transcript of Oral Argument at *31, *Reno II* (No. 96-511). For extensive explanations of the government's views see *The United States Department of Justice Home Page* (visited July 28, 1997) <http://www.usdoj.gov.>.

73. Brief for Appellees at *20, *Reno II* (No. 96-511).

74. *Id.*

75. *Id.* at *20–21.

76. Transcript of Oral Argument at *59–60, *Reno II* (No. 96-511). The appellees relied on the First Amendment rule that the government may not "reduce the adult population . . . to . . . only what is fit for children." Denver Area Educ. Telecomms. Consortium v. FCC, 116 S. Ct. 2374, 2393 (1996) (citations omitted). In *Denver*, the Court upheld a statute authorizing cable operators to prohibit indecent speech on television. *Id.* at 2397–98. In addition, the appellees cited *Sable*, which held that a complete ban on indecent dial-a-porn telephone conversations limited adults to what is appropriate for children. Brief for Appellees at *21, *Reno II* (No. 96-511) (citing Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 131 (1989)).

77. *Id.* at *20.

Next, the appellees argued the CDA was both substantially overbroad and unconstitutionally vague.[78] They asserted that the CDA was substantially overbroad because it neither defined its language nor its reach.[79] Furthermore, the appellees contended that the "indecent" provision[80] and the "patently offensive" provision[81] were too vague.[82] They stated that because these words were undefined, the CDA placed "millions of ordinary citizens . . . at risk of criminal prosecution merely for communicating in possibly 'offensive' terms online."[83]

Also, the appellees argued that the statutory defenses were ineffective and not technologically feasible.[84] First, they argued that the defenses did not provide speakers with guidelines on how to avoid criminal liability.[85] Second, according to the appellees, the defenses were not available and were also too expensive to the majority of speakers.[86] Third, they stated that the technological defenses such as credit card verification,[87] "tagging,"[88] and mandatory age verification were meaningless because, at the time of this case, it was impossible to effectively and economically determine the age of a speaker online in cyberspace.[89] Finally, the appellees asserted that the Supreme Court should not narrow the CDA by utilizing the

78. *Id.* at *39.
79. *Id.* at *41–42.
80. 47 U.S.C.A. § 223(a)(1)(B) (West Supp. 1997).
81. *Id.* § 223(d)(1).
82. Brief for Appellees at *42, *Reno II* (No. 96-511).
83. *Id.*
84. *Id.* at *46–47.
85. *Id.* at *44 n.25.
86. *Id.* at *20.
87. Credit card verification requires an Internet speaker to provide an on-line service with a valid credit card before "signing on" to the Internet. Brief for Appellees at *14, *Reno II* (No. 96-511). Then, the on-line provider has to verify the credit card with the credit card company to determine whether or not the speaker is a minor. The appellees argued that this is an ineffective defense because credit card verification is costly to the Internet providers. In addition, credit card companies will only verify a card if the request is for a commercial transaction. The appellees also point out that credit card verification is an entirely unavailable defense to Internet users who are not charged for access. *Id.* at *14–15.
88. The appellees, relying on the United States District Court's findings, contended that "tagging" is also not available because it is technologically impossible, burdensome on speakers, and does not prohibit minors from being sent "indecent" material. *Id.* at *16.
89. Transcript of Oral Argument at *27–29, *Reno II* (No. 96-511). For extensive explanations on the views and arguments of the appellees, see *The ACLU Freedom Network* (last modified July 23, 1997) <http://www.aclu.org.>.

statutory severability clause. Instead, they urged that the entire CDA should be struck down if the challenged provisions were found unconstitutional.[90]

C. *The Majority Opinion*

The cornerstone of *Reno II* was the majority's determination that the Internet is a distinct medium of communication which differs from broadcast media.[91] In order to establish this new medium, the majority distinguished the precedence relied upon by the government.[92]

Initially, the majority addressed *Ginsberg v. New York.*[93] In *Ginsberg*, the majority upheld a New York statute that prohibited the sale of obscene materials, such as magazines, to minors even if the materials were not considered obscene to adults.[94] The majority distinguished *Ginsberg* by contrasting the New York statute and the CDA.[95] First, the statute in *Ginsberg* did not ban parents from purchasing sexually-explicit materials for their children; however under the CDA, parents giving consent to their children to receive "indecent" communication could have been held criminally liable.[96] Second, the New York statute was only applicable to commercial transactions, while the CDA did not differentiate between the types of transmissions.[97] Third, the majority stated that the statute in *Ginsberg* provided a definition of the materials that were considered obscene for minors whereas the CDA left the terms "indecent" and "patently offensive" undefined.[98]

Likewise, the majority also distinguished *FCC v. Pacifica Foundation* for several reasons.[99] According to the majority, the statutes in *Pacifica* targeted specific broadcasts,[100] but the CDA prohibited broad categories of

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90. Brief for Appellees at *20, *Reno II* (No. 96-511).

91. *Reno II*, 117 S. Ct. at 2340, 2343. The Court's "medium-specific" analysis is similar to that applied by Judge Dalzell in *Reno I*. *See Reno I*, 929 F. Supp. at 872.

92. *Reno II*, 117 S. Ct. at 2341, 2343. *See* Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115 (1989); Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); FCC v. Pacifica Found., 438 U.S. 726 (1978); Ginsberg v. New York, 390 U.S. 629 (1968).

93. *Reno II*, 117 S. Ct. at 2341.

94. *Ginsberg*, 390 U.S. at 629.

95. *Reno II*, 117 S. Ct. at 2341.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 2341–42.

100. In *Pacifica*, a listener-supported radio station broadcast George Carlin's monologue "Dirty Words" in the middle of the afternoon when minors were most likely to hear it. *Pacifica*, 438 U.S. at 729–30.

speech with no limitations.[101] Also, the statutes differed because the FCC order was not punitive like the CDA.[102] Moreover, the majority explained that the radio is a different type of communication medium than the Internet and has historically been given limited First Amendment protection.[103]

Similarly, the majority distinguished the zoning ordinances in *Renton v. Playtime Theatres, Inc.* from the government's attempt to "cyberzone" by means of the CDA.[104] The majority found that the zoning ordinances in *Renton* only affected the location of adult movie theaters and bookstores, while the CDA zoned the content in all of cyberspace.[105] Since the CDA regulated "what" was transmitted and not "where" it was transmitted, the majority disagreed with the government's contention that the CDA is a time, place, and manner restriction.[106] Instead, the majority concluded that the CDA is a content-based regulation.[107]

By distinguishing these authorities, the majority differentiated the Internet from other communication mediums.[108] Initially, the majority explained that broadcast media has historically been regulated and supervised by the government because of its "'invasive' nature."[109] The majority adopted the district court's finding that Internet communications do not have the ability to invade a person's computer or home.[110] Instead, the majority determined that the Internet is different from broadcast media because encountering adult-oriented material on the Internet "'requires a series of affirmative steps more deliberate and directed than merely turning a dial.'"[111]

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101. *Reno II*, 117 S. Ct. at 2341–42.

102. *Id.* at 2342. There were two statutes in *Pacifica* prohibiting the use of indecent language on radio communications. *Pacifica*, 438 U.S. at 739 n.13.

103. *Reno II*, 117 S. Ct. at 2342.

104. *Id.* "Cyberzoning" is a zoning ordinance in cyberspace. *Id.*

105. *Id.* In addition, the Court also pointed out that the government interest in *Renton* was to protect children from the "secondary effects" of adult-oriented materials, but the government's interest in the CDA was to protect children from the "primary effects of 'indecent' and 'patently offensive' speech." *Id.*

106. *Reno II*, 117 S. Ct. at 2342–43.

107. *Id.* at 2342. For a good example of a case involving a content-based restriction, see *Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (holding that "[t]he Son of Sam law is such a content-based statute" because "[i]t singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content").

108. *Reno II*, 117 S. Ct. at 2343.

109. *Id.* (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989)).

110. *Id.*

111. *Id.* at 2336 (quoting *Reno I*, 929 F. Supp. at 845).

By analogy, the majority relied on *Sable Communications of California, Inc. v. FCC* to prove this point.[112] The majority viewed searching for sexually explicit material on the Internet to be the same as the conduct in *Sable* of placing a "dial-a-porn" telephone call.[113] Furthermore, the majority concluded that the Internet and broadcast media differ because most adult-oriented material on the Internet provides warning screens for minors whereas radio and television do not have such warning devices.[114]

Additionally, the majority ruled that First Amendment scrutiny should be applied to issues regarding freedom of speech on the Internet.[115] First, the majority agreed with the lower court that the "indecent" provision and the "patently offensive" provision were too vague because they lacked definitions.[116] Next, the majority established its concerns that because the CDA is an undefined, punitive content-based regulation, it would have an "obvious chilling effect on free speech."[117]

As a result, the majority declared that the CDA was overbroad on its face because it suppressed constitutionally protected speech between adults when less restrictive alternatives existed for advancing the government's interest.[118] The majority recognized that there is a governmental interest in shielding minors from harmful speech.[119] However, the majority determined that this interest did not justify molding adult speech into what is appropriate for children.[120]

In addition, the majority rejects the government's argument that the CDA's scienter requirement and the statutory defenses save it from failing because of overbreadth.[121] The majority, relying on the lower court's factual findings, agreed that at the time of the decision, the technology for

112. *Id.* at 2343.

113. *Reno II*, 117 S. Ct. at 2343–44.

114. *Id.* at 2343.

115. *Id.* at 2344.

116. *Id.* at 2344–45.

117. *Id.* at 2344.

118. *Reno II*, 117 S. Ct. at 2347. The majority was also concerned about the issue of applying community standards of the person offended to material on the Internet. The Court explained that the application of community standards to a transmission sent to the entire nation will be judged by the community of the offended listener. *Id.* For good articles on both sides of this issue see Joanna H. Kim, Comment, *Cyber-Porn Obscenity: The Viability of Local Community Standards and the Federal Venue Rules in the Computer Network Age*, 15 LOY. L.A. ENT. L.J. 415 (1995); and Timothy S. T. Bass, Comment, *Obscenity in Cyberspace: Some Reasons for Retaining the Local Community Standard*, 1996 U. CHI. LEGAL F. 471 (1996).

119. *Reno II*, 117 S. Ct. at 2346.

120. *Id.*

121. *Id.* at 2349.

monitoring all of cyberspace did not exist and the means that did exist were too expensive for the non-commercial user.[122] In addition, the Court refused to utilize the "severability clause" included in the CDA.[123] According to the opinion, even "textual surgery" could not have saved the CDA.[124]

D. *The Concurring in Part, Dissenting in Part Opinion*

Chief Justice Rehnquist joined Justice O'Connor's concurring in part, dissenting in part opinion in which she declared that she would strike down the challenged provisions only to the extent that adult speech is suppressed.[125] The cornerstone of Justice O'Connor's opinion was her argument that what the majority called the "patently offensive" provision[126] was actually two separate provisions.[127] According to Justice O'Connor, these were the "'specific person' provision"[128] and the "'display' provision."[129] Although Justice O'Connor agreed with the majority that the "display provision" was unconstitutional because it was technologically impossible to zone all of cyberspace, she argued that the other provisions were constitutional as long as the adult sending the transmission knows that the recipient of the material is a minor.[130]

Justice O'Connor agreed with the majority that the provisions were overbroad; however, she argued that the appellees had not proven that they

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122. *Id.* In her concurring in part, dissenting in part opinion, Justice O'Connor agreed with the majority that in cyberspace "'there is no means of age verification,' cyberspace still remains largely unzoned—and unzoneable." *Id.* at 2354 (quoting *Reno I*, 929 F. Supp. at 846).

123. *Reno II*, 117 S. Ct. at 2349–50. The Court did not utilize the "severability clause" for two reasons. First, the Court stated that its jurisdictional review was limited by the CDA, to only challenges to the statute "on its face." *Id.* at 2350; 47 U.S.C.A. § 608 (West Supp. 1997). The Court explained that severing the CDA would change the litigation into an "'as-applied' challenge." *Reno II*, 117 S. Ct. at 2350. Second, the Court stated that "[t]he open-ended character of the CDA provides no guidance what ever for limiting its coverage." *Id.*

124. *Id.*

125. *Id.* at 2357 (O'Connor, J., concurring in part, dissenting in part).

126. *See* 47 U.S.C.A. § 223(d)(1) (West Supp. 1997).

127. *Reno II*, 117 S. Ct. at 2352 (O'Connor, J., concurring in part, dissenting in part).

128. *Id.* (quoting 47 U.S.C.A. § 223(d)(1)(A) (West Supp. 1997)). Justice O'Connor stated this provision "makes it a crime to knowingly send a patently offensive message or image to a specific person under the age of 18." *Id.*

129. *Id.* (quoting 47 U.S.C.A. § 223(d)(1)(B) (West Supp. 1997)). Justice O'Connor stated this provision "criminalizes the display of patently offensive messages or images 'in a[ny] manner available' to minors." *Id.* (quoting 47 U.S.C.A. § 223(d)(1)(B) (West Supp. 1997)).

130. *Reno II*, 117 S. Ct. at 2357.

were substantially overbroad.[131] Furthermore, Justice O'Connor contended that the CDA could have been applied constitutionally because it was not substantially overbroad with respect to the rights of minors.[132] Consequently, Justice O'Connor urged that the "indecency provision" and the "specific person provision" should be sustained when communication is between an adult and a minor.[133] Justice O'Connor concluded that the challenged provisions should only be invalidated to the extent that the provisions encroached on communication between adults.[134]

IV. ANALYSIS OF RENO V. AMERICAN CIVIL LIBERTIES UNION

Under the CDA, a mother could be sent to prison for up to two years for sending an e-mail on birth control to her seventeen-year-old daughter at college if the community standards would define the message as "indecent."[135] Similarly under the CDA, an adult can enter an "adult only" chat room and suppress the speech of every adult present by simply saying, "my sixteen-year-old son is sitting here with me."[136] If hypotheticals like these exist, it is difficult to find flaws in the majority's decision that the CDA abridges the First Amendment. The majority opinion is well-reasoned and logical. By taking a "medium-specific" approach, the Supreme Court correctly determined that the Internet differs from broadcast media and deserves unfettered First Amendment protection.[137]

In addition, both the United States district court and the Court accurately found that there is a compelling governmental interest in protecting the well-being of minors from harmful materials on the Internet because minors are extremely impressionable.[138] If the government does not prohibit minor's access to sexually explicit material on the Internet in some manner, the mental development of minors could be severely effected.[139] In

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131. *Id.* at 2356.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Reno II*, 117 S. Ct. at 2348.

136. The Court calls this hypothetical situation the "heckler's veto" because any user could sign on and say that their minor son is present even if that user did not have a son. *Id.* at 2349.

137. *Id.* at 2343.

138. *Id.* at 2341. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968) (Justice Brennan agreed that "[t]he well-being of its children is of course a subject within the State's constitutional power to regulate").

139. Justice Powell agreed that "children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling

addition, the Court's conclusion that the CDA did not advance this interest is on the mark. The pinnacle of the Court's rationale is the determination that the CDA was both too vague and overbroad.[140] Since the legislative history of the CDA showed that the definitions of "indecent" and "patently offensive" were omitted, exactly what do these terms mean?[141] The Court has repeatedly held that "'sexual expression which is indecent but not obscene is protected by the First Amendment.'"[142] Thus, in order not to chill the speech of society, it is imperative that these terms are adequately defined in the CDA.

Furthermore, the Court correctly decided that the CDA regulated more than is necessary to achieve the appellant's compelling interest because it regulated constitutionally protected speech among adults.[143] If Congress wants to permissibly prohibit this type of speech, it must show that it is trying to further a compelling governmental interest.[144] Although the interest asserted by the appellants was compelling, in order to withstand strict scrutiny, the government needed proof that the CDA was narrowly constructed to advance this interest.[145] The Court accurately reasoned that since the CDA infringed upon the constitutionally protected speech of adults, it was not narrowly-tailored and regulated more than was necessary.[146] Therefore, instead of referring to the CDA as failing strict scrutiny, the Court logically invalidated the challenged provisions by utilizing the overbreadth doctrine.[147]

The Court's ruling that neither the statutory defenses nor the "severability clause" save the CDA from constitutional muster is also

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through the exercise of choice. At the same time, such speech may have a deeper and more lasting negative effect on a child . . . ." FCC v. Pacifica Found., 438 U.S. 726, 757–58 (1978) (Powell, J., concurring).

140. *Reno II*, 117 S. Ct. at 2344–47.

141. *Id.* at 2347.

142. *Id.* at 2346 (quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).

143. *Id.* at 2347. The Court stated that the "undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value." *Id.*

144. *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (stating "we have required the State to show that the 'regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end'") (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

145. *Reno II*, 117 S. Ct at 2344.

146. *Id.*

147. *Id.* at 2347. The Court stated, "the breadth of the CDA's coverage is wholly unprecedented." *Id.*

sound.[148] Since the facts show that technology does not exist to monitor the content of cyberspace, the statutory defenses are based more on what future technology holds.[149] In addition, the Court correctly points out that in order for the Court to apply the CDA's "severability clause," the provisions would have to be "'readily susceptible'" to change.[150] Neither of the challenged provisions is susceptible to severability because the CDA would still be a content-based regulation even if the Court was to merely remove the undefined terms.[151] The Court has held that most content-based regulations are analyzed under strict scrutiny.[152] After applying strict scrutiny to the severed CDA, it would still likely be struck down because it does not advance a compelling interest of the government.

Unlike the majority opinion, Justice O'Connor's concurring in part, dissenting in part opinion provokes questions. For example, Justice O'Connor's contention that "the CDA can be applied constitutionally in some situations"[153] presents this question: In which situations could the CDA have been constitutionally applied? Justice O'Connor failed to give examples. If Justice O'Connor is referring to her argument that the CDA should be sustained in situations where the CDA restricts the speech of minors and not that of adults, then this argument presents another question.[154] How are courts going to limit the CDA from restricting only speech effecting the rights of minors and not the communication between adults? The only means available would be to utilize the CDA's "severability clause."[155] Incidentally, Justice O'Connor failed to address the "severability clause."[156]

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148. *Id.* at 2350–51.

149. Chief Judge Sloviter stated: "I can imagine few arguments less likely to persuade a court to uphold a criminal statute than one that depends on future technology . . . ." *Reno I*, 929 F. Supp at 857.

150. *Reno II*, 117 S. Ct. at 2350 (quoting Virginia v. American Bookseller's Ass'n, Inc., 484 U.S. 383, 397 (1988) (citations omitted)).

151. The CDA is regulating the content of what minors could access on the Internet; thus, it is content-based. Brief of the Volunteer Lawyers for the Arts, Various Artists and Art Organizations as *Amicus Curiae* in Support of Appellees at *16, *Reno II* (No. 96-511), 1997 WL 76015.

152. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. St. Crime Victims Bd., 502 U.S. 105, 116 (1992); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975).

153. *Reno II*, 117 S. Ct. at 2355 (O'Connor, concurring in part, dissenting in part).

154. *Id.*

155. *See* 47 U.S.C.A. § 608 (West Supp. 1997).

156. See Justice O'Connor's concurring in part, dissenting in part opinion in *Reno II*. *Reno II*, 117 S. Ct. at 2351–57.

Likewise, Justice O'Connor did not address the issue of the CDA's vagueness,[157] which presents yet another question. If the Court was, as Justice O'Connor argued, to sustain the "indecency transmission" provision,[158] how are people to know what "indecent" means? The CDA did not define the word.[159] Since the CDA is a criminal statute, people must know the definition of "indecent." Otherwise, Internet users will not know whether their communication is legal. This creates a potential violation under the Due Process Clause of the Fifth Amendment.[160] The Court affirmed *Shea v. Reno*[161] which stated, "[d]ue process requires that a criminal statute 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'"[162] The Court never reached a due process argument because it invalidated both of the challenged provisions of the CDA as facially overbroad.[163] If Justice O'Connor's argument prevailed that the "indecency transmission provision" was not overbroad, a due process challenge would have rendered this provision unconstitutional.

V. CONCLUSION

A. *Implications and Ramifications*

Reno II has defined the scope of the Internet under the First Amendment. This decision implies that speech on this new medium will receive broad First Amendment protection.[164] As the Internet continues to expand rapidly, the 7–2 majority sends a message that content-based restrictions on the Internet will be struck down for a long time to come. Justice Stevens concluded the majority opinion in *Reno II* by summarizing the Court's approach to content-based freedom of speech:

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157. *Id.*

158. Justice O'Connor's reference to the "indecency transmission" provision is the same as what the majority opinion calls the "indecency" provision. *Id.* at 2356.

159. In *Reno II*, the majority stated "[g]iven the absence of a definition of either term . . . provoke[s] uncertainty among speakers about how the two standards relate to each other and just what they mean." *Id.* at 2344.

160. The Due Process Clause of the Fifth Amendment to the United States Constitution states: "No person shall be . . . deprived of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. V.

161. 930 F. Supp. 916 (S.D.N.Y 1996), *aff'd*, 117 S. Ct. 501 (1997).

162. *Id.* at 937 (quoting Grayned v. Rockford, 408 U.S. 104, 108 (1972)).

163. *Reno II*, 117 S. Ct. at 2344.

164. *Id.*

> As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.[165]

Further, by analyzing the Internet as a new specific medium, *Reno II* will have long standing ramifications on future Internet challenges and legislation. Additionally, as technology continues to evolve, there will be new constitutional concerns in cyberspace.[166] It is impossible to predict how the Court may resolve future challenges to the Internet under other amendments; however, for now, we can be sure the our speech is stringently protected.

B. *Future Internet Regulations*

It is easy to conclude that the CDA was merely the first piece in a long line of regulatory Internet legislation.[167] Many commentators have called the second wave of legislation the "son of CDA" or "CDA II."[168] As far up as the White House, the wheels are already in motion for new Internet restrictions.[169] In addition, proposals for new legislation are already being created by many state representatives.[170] Regardless of how many pieces of national legislation are proposed, *Reno II* helps define how these bills should be drafted in order to withstand a First Amendment challenge.[171] The Court

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165. *Id.* at 2351.

166. *See generally* Minnesota v. Granite Gate Resorts, No. C6-95-7227, 1996 WL 767431, at *10 (Minn. Dist. Ct. Dec. 11, 1996) (ruling on the development of gambling on the Internet, the United States District Court for the District of Minnesota applied its state laws to an out of state Internet gambling company).

167. *See* Wendy R. Leibowitz, *Politicians v. Technology: Why Congress Loves to Hate the 'Net*, NAT'L. L.J., July 14, 1997, at B9.

168. Richard Raysman & Peter Brown, *'Reno v. ACLU' – The First Amendment Meets the Internet*, 218 N.Y. L.J., July 8, 1997, at 3.

169. *Id.* at 7.

170. As examples, California's Democratic Representative, Zoe Lofgren, has introduced the "Internet Freedom and Child Protection Act" (H.R. 744), Pennsylvania's Republican Representative, Joseph M. McDade, has created the "Family-Friendly Internet Access Act of 1997" (H.R. 1180), and Washington's Democratic Senator, Patty Murray, is working on the "Child Safe Internet Act of 1997." *Id.*

171. *Reno II*, 117 S. Ct. at 2348.

implied that future legislation must be narrowly-tailored.[172] In order to achieve this goal, the Court suggested alternatives such as tagging, defining vague terms, "making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet—such as commercial web sites—differently than others, such as chat rooms."[173]

The Internet does need regulation to protect the well-being of minors. However, there must be a carefully crafted balance between what, how, and to whom the Internet is censored. Due to the fact that there were no alternatives, striking down the CDA worked to protect our freedom of speech.

Jeffrey L. Cox

172. *Id.*
173. *Id.*